

# THE COMMUNICATION OF PROFESSIONAL VALUES

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In their *Dialogues*, MacLeish says that "it's very rarely that a man is really shaped or given new direction by a given individual"<sup>1</sup> and van Doren quotes Socrates to the effect that "nobody could learn anything or did learn anything except what he already knew, but he didn't know he knew it."<sup>2</sup> Twenty years ago Jacques Barzun asserted that "the only way to instill any human virtue is to have parents and teachers and friends who are themselves tolerant and just, and who in all reasonable opportunities evince that character."<sup>3</sup>

Emanating from such sources, views like these might well generate only frustration and discouragement. For in the field of ethics it is "new direction" we hope to give; a learning of something not hitherto known, even subconsciously; it is a human virtue that, even during some sixteen years of pre-professional education, has not been adequately instilled by the example of parents, friends and teachers.

Can it really be that these writers believe that pedagogically speaking it is impossible to communicate a perception of values? Or at least that no value not previously perceived, whether knowingly or unknowingly, can be communicated? But doesn't this beg the question? Children will have been told, for instance, of the values of truth and integrity. Obviously, no one will have reached law school without having learned of these, without having heard that they have usefulness, are considered significant in the conduct of human affairs. In this sense a course in the Legal Profession or Legal Ethics might be said to introduce no new value. Yet clearly, these values are now revealed in a new environment, the environment of professional conduct—conduct in relation to the client and the client's property, conduct toward the court regarding suppression or falsification of evidence or of applicable law.

In childhood there are conflicts between loyalty to parent or teacher, as contrasted with loyalty to brother or comrade or

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<sup>1</sup> MacLeish & van Doren, *Dialogues* 278 (1964).

<sup>2</sup> *Id.* at 98.

<sup>3</sup> Barzun, *Teacher in America* 33 (1945). Barzun does not suggest how these tolerant exemplars themselves became tolerant.

members of the same club or gang. A value judgment has to be made between these loyalties; they must somehow be resolved at an early age. Yet they reappear dramatically in the new environment of conflicts between the interests of lawyer and client, or the client and the court, or the government or the public interest.

One need hardly run the gamut of McDougal's inventory of values to hazard the conjecture that each will have been experienced by every law student at a period long antedating even his first ambition to become a lawyer. This would seem to make a case for the remark attributed to Socrates, but it is still a far cry to contend that "it's very rarely that a person is really shaped or given new direction by a given individual." If a perception of values, however latent, has in fact been attained there yet remains a vast opportunity for its clarification and application to the new relationships that come with professional life. Even Barzun allows for this, albeit he confines what he calls the instillation of values to a single means: that of example.<sup>4</sup>

But it is obvious indeed that the "noble exemplar method" has fallen far short of the goals we must set for ourselves in legal education. This is only too clear from a daily reading of the newspapers, where the misdoings of our law-trained graduates are recorded often enough to dispel any sense of smugness as to how persuasive the examples of their noble law teachers have already been. Records of discipline committees and courts—far too few, one suspects, for the amount of misconduct that actually goes on—confirm this,<sup>5</sup> and while public opinion polls are far less dependable as to the conduct of lawyers than as to the voting probabilities of the electorate, they reveal, nevertheless, a disconcertingly widespread state of ill-repute of the practicing bar.<sup>6</sup> We have long ago

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<sup>4</sup> For an interesting illustration of the early application of this to legal education see Samad, "The Pervasive Approach to Teaching Professional Responsibility," 26 Ohio St. L.J. 100 (1965).

<sup>5</sup> Carlin, *Lawyers on Their Own* (1962), a survey of individual and small firm practitioners in Chicago. The same author's later study, not yet published, is based on interviews with some 800 lawyers in lower Manhattan together with an examination of records of courts and discipline committees of the bar. He finds that about 1,500 complaints are filed against lawyers each year, only nineteen of which ever reach the courts—of these ten result in disbarment. Carlin, "Ethics and the Legal Profession—A Study of Social Control in the Metropolitan Bar," 1963 (Manuscript in Bureau of Applied Social Research, Columbia University).

<sup>6</sup> See "Lay Opinions of Iowa Lawyers, Courts and Laws," Committee on Public Relations, Iowa State Bar (1949), summarized in Blaustein, "What Do Laymen Think of Lawyers?" 38 A.B.A.J. 39 (1952). The most extensive of these surveys is doubtless the Missouri Bar Prentice-Hall Survey, in the making of which 2,500 laymen and the same number of lawyers were interviewed. This has been commented on extensively by leaders of the American Bar.

rejected, by force of incontrovertible fact, any assurance we may once have had that the professional activities and high character of the teaching profession (and that, at least, is an assumption we still adhere to with justifiable confidence) have proved adequate for education in ethics and responsibility.

If it be assumed that a way can be found for clarifying the application of ethical values to the professional environment and that professorial examples have fallen far short of providing this way, one is faced with at least three questions: what are the various techniques that are open to us; what is the subject matter to which we should apply ourselves; and what type of teaching materials are most conducive to greater success than we have had in the past?

The pedagogical techniques have long ago been discussed.<sup>7</sup> More recently, at the New York conference of British, Canadian, and American law teachers, they were so fully summarized<sup>8</sup> that little more is needed here than a brief inventory by way of refresher. What has been called the "noble exemplar" theory seems still the exclusive approach (if it can be called an approach at all) in England, and in many Canadian and a minority of American law schools. One need not be a cynic to suggest that too often this is but a cloak for indifference, inertia, or frustration. Unhappily, the claim that ethical considerations are being adequately introduced into non-ethics courses is too often another cloak of the same color. This is certainly a justifiable inference to be drawn from a study made some years ago by a committee of the Association of American Law Schools. In reply to inquiries, the deans of forty-five law schools stated that at least one member of their faculties was engaged in this practice. It would seem, however, that the deans must have thought of several such gentlemen, for a total of 112 names were submitted. Each of these was written to and the replies revealed only twenty-six who were of the belief that they were actually doing this.<sup>9</sup>

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<sup>7</sup> See Stone, *Legal Education and Public Responsibility*, a Report and Analysis of the Conference on the Education of Lawyers for Their Public Responsibilities, 1956 (1959) (Boulder Conference).

<sup>8</sup> Mathews, "The Public Responsibilities of the Academic Law Teacher," 14 J. Legal Ed. 97 (1961), wherein are enumerated certain other approaches not treated in this paper: (a) the non-ethics course structured for the added purpose of introducing discussion of ethical consideration, (b) joint lawyer-student discussion groups, and (c) the use of Legal Aid Clinics for this purpose. Certain of these are also dealt with in Mathews, "Education for Professional Responsibility," 21 La. L. Rev. 140 (1960).

<sup>9</sup> A.A.L.S., Program and Committee Reports 93 (1958); A.A.L.S., Program and Committee Reports 62 (1959). It is fair to question how many of the twenty-six were making this effort in any sort of systematic fashion. Even so, out of 108 law schools in the Association at that time with perhaps 2000 faculty members this

More recently there has emerged a much more promising trend. It was at the Boulder Conference in 1956 that, so far as is known, the phrase "pervasive approach" was first used. It was introduced by the late Edwin E. Aubrey, a non-lawyer theologian.<sup>10</sup> The term is now used for a systematic and planned introduction of relevant ethical considerations into a course devoted primarily to other subject matter.<sup>11</sup> The most encouraging impetus to experimentation in this approach has been provided by the National Council on Legal Clinics, a joint project of the American Bar Association and the Association of American Law Schools. To date the Council has published two booklets devoted to the use of the pervasive approach in each of two fields: the administration of criminal justice<sup>12</sup> and family law.<sup>13</sup> These are excellent examples of the systematic planning of the introduction of ethical considerations into non-ethics courses.<sup>14</sup> Undoubtedly, as an approach to this major pedagogical problem of communication of a grasp of ethical values, this is one of the two most promising.<sup>15</sup> It has, in fact, given new vitality and quality to the traditional case-method of teaching.

The more traditional mode of dealing with ethics and responsibility has been by a separate course primarily directed to the purpose, sometimes referred to as a "concentrated" course, involving

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was indeed a small group of devotees to the cause of education in ethics. A more recent study, Lamborn, *Legal Ethics and Professional Responsibilities* (1963), concludes that "about four-fifths of the approved law schools indicate a use in some degree of the pervasive method. . . . The planned use of the pervasive method with special materials prepared for the purpose has been found in less than a dozen schools and in only a limited number of courses." *Id.* at 7-8.

<sup>10</sup> Professor Aubrey was Chairman of the Department of Religious Thought at the University of Pennsylvania. For his use of this term and the discussion it prompted, see Stone, *op. cit. supra* note 7, at 245, 385. Dean Samad recognizes this in quoting from the Introduction to Professor Stone's account. See Samad, *supra* note 4, at 104.

<sup>11</sup> An early attempt to outline such an approach was made by the present author, using the subject matter of Agency and Partnership law as the vehicle course. See Stone, *op. cit. supra* note 7, at 387. That the approach be planned and systematic, rather than spontaneous and sporadic is essential. See Mathews, "Education for Professional Responsibility," 21 *La. L. Rev.* 140, 147 (1960).

<sup>12</sup> Schwartz, *Cases on Professional Responsibility and the Administration of Criminal Justice* (1961).

<sup>13</sup> In particular, see Levy, *Selected Materials on Family Law: Custody, The Unwed Mother, Adoption, Parental Neglect* (1964).

<sup>14</sup> For summation of the fifteen projects sponsored by the National Council, see National Council on Legal Clinics, *Preliminary Reports on Seven Experimental Projects* (1962) and Lamborn, *op. cit. supra* note 9, at 11-13.

<sup>15</sup> This has been well discussed by Samad, *supra* note 4, in the present issue of this Journal. Also, Lamborn has presented a most comprehensive over-all picture, with special consideration of this approach in his recent survey. See Lamborn, *op. cit. supra* note 9.

"direct teaching."<sup>16</sup> In his recent survey of methods of instruction in American law schools, Lamborn has pointed out that about seventy-seven per cent of the law schools responding (ninety-five schools) offer such courses.<sup>17</sup> He states that by far the greatest proportion are using one of the three casebooks presently available.<sup>18</sup> Excellent as these are, they raise the serious question of whether a casebook approach is suitable for this "concentrated course." This author has used each of these three works in class and after due consideration has arrived at a negative conclusion.

The case method was devised for the communication of dialectical skills. Despite the lately accepted tendency to qualify this method by textual material and problems, it remains even today the unquestioned sovereign of the freshman year, and the predominant leader in the second and third. However, as a device to communicate or clarify values it has, until development of the pervasive approach, proved a disappointment. Some have even said it has only served to impede this function.<sup>19</sup> Of necessity, the opinions used are largely of appellate tribunals, and the number of lawyer discipline cases that reach this point in the judicial hierarchy is very small indeed. By all odds the huge majority are dealt with by local bar association committees with occasional confirmation by state committees and state supreme courts (as in Ohio) or by trial courts. This inevitably means that judicial accounts of most of the incidents involving complaints about lawyer conduct simply cannot be found for class discussion, and those that are available are confined to the more extreme form of misconduct, what might be called the "peripheral pathology."<sup>20</sup>

If these considerations are persuasive, one is of course driven to provide a practical alternative and that, I suggest, is readily

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<sup>16</sup> Stone, *op. cit. supra* note 7, at 242, 252-59.

<sup>17</sup> Lamborn, *op. cit. supra* note 9, at 3.

<sup>18</sup> A fourth, compiled by Vern Countryman of Harvard, now in temporary mimeographed form, will be published shortly.

<sup>19</sup> See Lon Fuller's comment as reported in Stone, *op. cit. supra* note 7, at 82. Also, in his Epilogue, Professor Stone introduces this same query but both are speaking in particular relation to the introduction into the curriculum of an increasing number of specialized courses. *Id.* at 323. Patterson, "The Case Method in American Legal Education: Its Origins and Objectives," 4 J. Legal Ed. 1 (1951), contains no reference to the communication of ethical values among his ten Merits of the Case Method, but within the tenth Demerit he lists its inability to touch certain problems, the illustrations of which all fall within what has come to be called "public responsibility." See also Morgan, "The Case Method," 4 J. Legal Ed. 379 (1952), a report prepared for the Survey of the Legal Profession; the report contains no reference to the matter in question.

<sup>20</sup> The writer has long since expressed his concern on this score. See Mathews, *supra* note 11, at 148.

at hand. It is the preparation of a collection of factual situations wherein lawyers are presented as having faced, or as about to face, issues of personal or professional conduct. Immediately this permits introduction into class discussion of an immense number of issues now necessarily excluded by the limitations inherent in the case method. All the borderline questions involved in the building of a law practice, preparation for and participation in trial work, and the subtleties and ambiguities of possible conflicts in interest, as well as the countless aspects of responsible counseling,<sup>21</sup> can be set forth in narrative episodes quite regardless of the unavailability of written accounts or primary sources. If, too, as is now so generally accepted, one wishes to discuss the affirmative responsibility of lawyers to participate in leadership and educational programs in their communities and nation, almost the only way to do this is by means of problems raising questions as to the duty to take advantage of opportunities of this sort.<sup>22</sup>

Moreover, there are those who have found that student attitudes toward the subject matter of a "concentrated course" in ethics, especially if the course is required rather than elective, introduce impediments not found elsewhere in the curriculum. Often there is indifference, occasionally even hostility, and quite generally a wide-spread skepticism as to whether a teacher, long removed from practice and presently untrammelled by conflicts between

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<sup>21</sup> An illustration of how effectively the art of counseling can be presented to law students can be seen in a quite remarkable book, Freeman, *Legal Interviewing and Counseling* (1964). After seventy-nine pages of textual material on interviewing and counseling the remainder of the volume is given over to a series of narrative episodes about half of which are followed by comments by a portion of the fourteen contributors, all law-trained but all trained also in such related fields as religion, sociology, psychology and psychiatry. For an excellent discussion of the function of the lawyer as counselor in matrimonial affairs, see Pike, *Beyond the Law* 44 (1963).

<sup>22</sup> An important aspect of such responsibility has been tellingly developed by Professor Jerre Williams in a statement published in the Appendix to Stone, *op. cit. supra* note 7, at 394-98. He there advocates that "lawyers be trained as effective policymakers in resolving significant public controversy." He makes a strong plea that teachers try to work out ways to sensitize students to controversial public issues; to develop "the ability to accomplish objectives and responsible resolution of the competing political, social and economic factors that go into such a policy decision." This emphasis was later brought out in the statement of the Joint Conference on Professional Responsibility, 44 A.B.A.J. 1159, 1217 (1958), and in the late Arthur T. Vanderbilt's address at Seton Hall, Report of the Conference on Professional Responsibility, 26-27 (1956).

Another approach is by means of assigned readings in history and biography wherein law-trained persons are shown to have made contributions of this sort. Lamborn, *op. cit. supra* note 9, at 9, includes a reference to this. While undeniably a useful teaching device, it is essentially supplemental and scarcely lends itself to the give and take of class-room discussion.

the interests of clients and his own idealism, can deal realistically with the alternatives of conduct faced by practitioners.<sup>23</sup> While too often these obstacles are never adequately overcome, it remains nevertheless true that a collection of factual situations, far more than court decisions and bar opinions, catches student interest and imagination to such an extent as to off-set in large part these difficulties. In sum, I suggest that a collection of problems relating to the conduct of lawyers will provide a more effective vehicle for teaching purposes than any of the materials now available for courses directed primarily to ethics and public responsibility.

The subject matter for a course in the Legal Profession has already been so well outlined by Professor Countryman elsewhere in this Journal<sup>24</sup> that there is little to be gained by restating or summarizing it here. Perhaps, however, it may be relevant to add that it was less than twelve years ago that most of those relatively few teachers and practitioners who were concerned with this matter at all were of the opinion that the subject matter should be restricted to the conventional areas of the attorney's duty to client, court, fellow attorney, and such of the public as might be affected adversely by the performance or rejection of these duties. This area was then known as "Legal Ethics" and had always been regarded as comprising all that might be properly included within a law curriculum. It has long been my own view, however, that to restrict our concern so narrowly was to exclude the far broader field of community responsibility<sup>25</sup> that Professor Countryman has summarized. While there is no need here to restate the boundaries of this area, there are two comments that are important to make.

The first of these relates to the boundaries themselves. There is one component of public responsibility, not mentioned elsewhere which, in my opinion, should clearly be added. This is the education of lawyers in an understanding of the personal values that our

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<sup>23</sup> For instance, see Mathews, "Public Responsibilities of the Academic Law Teacher," 14 J. Legal Ed. 97, 99 (1961).

<sup>24</sup> Countryman, "The Scope of the Lawyer's Professional Responsibility," 26 Ohio St. L.J. 66 (1965). An even more comprehensive survey was provided by Professor Countryman and Professor David R. Herwitz for the Second Arden House Conference: "Implementation of Education for Professional Responsibility" (1963) (unpublished). See also Lamborn, *op. cit. supra* note 9, at 3, where the distinction between "legal ethics" and "professional responsibility" is well drawn.

<sup>25</sup> Mathews, "Legal Education and Responsible Leadership," 4 J. Legal Ed. 249 (1952). The program there proposed was later endorsed by the Association of American Law Schools, the Council of the Section of Legal Education of the American Bar Association and an impressive list of individual sponsors. See "Activities of the Association," 5 J. Legal Ed. 217 (1952). The program was submitted to five foundations but it proved impossible to obtain a grant to the Association at that time.

structure of government is intended to serve, and in his responsibility, as one so educated, to protect and strengthen those values and to make them living forces. To be sure, part of this is implicit under a heading such as "Public Leadership," but this particular opportunity and responsibility of the lawyer should be specifically directed to the purpose and nature of our sort of democracy and its institutions—to what MacLeish has elsewhere called the "American Proposition."<sup>26</sup> Basically, this means respect for personality, one's own as well as that of others. This, after all, is the one fundamental value upon which all other values rest. If understood and genuinely accepted by students and lawyers, it can provide the motivation for all else, for the fields both of legal ethics and public responsibility, including community leadership, as well as a devotion to making the democratic process effective in countless ways of personal participation and education of the citizenry in the issues, policies and values at stake.<sup>27</sup> It has been repeated to the point of tedium that whatever the law schools do or omit to do, our graduates will appear in public office and positions of leadership far more frequently than the members of any other profession. It necessarily follows that it is the responsibility of the law schools to educate these potential leaders so that they will understand fully the concomitant obligations that go with leadership. Failure to do so is nothing less than irresponsible.

Here one meets again the question of the applicability of the case method to education in this broader field. One has but to recall Professor Countryman's categories to raise this question. While court decisions are available relating to the lawyer's duty toward courts and adequate representation of the needy, it is not an easy task to locate decisions concerning a lawyer's appearance as a

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<sup>26</sup> MacLeish, *Freedom is the Right to Choose*, Foreword at viii (1943).

<sup>27</sup> Justice Stanley Reed stated many years ago, "Democracy has a right to expect that the members of its Bar, as such, shall show their appreciation of the benefits conferred upon them by a conscious effort to make that democracy effective." "The Bar's Part in the Maintenance of American Democratic Ideals," 24 A.B.A.J. 622 (1938). Moreover, the present writer has asserted this persistently for many years: *supra* note 25; "Professional Education and the American Tradition," in *Selected Readings on the Legal Profession* 497 (1962); "Legal Ethics and Responsible Leadership," *id.* at 493; Stone, *op. cit. supra* note 7, at 263, 403. See generally, A.A.L.S., *Selected Readings on the Legal Profession* 407-22 (Boyer, Harno, Mathews & Bradway ed. 1962); Harno, *Legal Education in the United States* 196 (1953). Said Henry L. Stimson, "I came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. . . . I came to realize the importance played in a democracy by persuasion as distinguished from force or threats and to recognize the importance of the lawyer as a trained advocate of persuasion." Stimson & Bundy, *On Active Service in Peace and War*, Introduction at xxxii (1948).



witness or lobbyist before a legislative body, his participation in law reform, defense of the judicial system, public leadership, and the organization and proper functioning of the bar. It would be even more difficult to bring out by judicial materials the lawyer's responsibility to take time from a busy practice to enter into public and controversial discussion of such diverse issues as fair housing and racism, limitation on Congressional power to tax, strengthening of the United Nations and of UNESCO, the anti-poverty program and the dangers of right wing extremism or of military domination of questions of foreign policy. Nor would it be difficult to name at least as many more. True, textual excerpts can be inserted to cover these responsibilities, but as teaching vehicles these are grossly inadequate for stimulation of student interest and the provocation of discussion. Yet each of the named areas is admirably suited for development by means of problems. Indeed, each provides a further persuasive argument for the problem approach.

One final comment should be made here. It concerns the question of indoctrination. It has long seemed strange indeed that this has so little concerned writers in this field.<sup>28</sup> True, where training in skills and techniques is concerned, the question is unlikely to be critical, but where it is values that are to be communicated or clarified, attitudes to be stimulated, the problem is very real indeed.

Here we reach the point where a commitment must be boldly made, bravely hazarded. Indoctrination as here used, contains the factor of compulsion as contrasted with considered choice and conscious acceptance. The office of teacher implies authority; his spoken word carries a weight disproportionate to its merit. Too often his value judgments are accepted unthinkingly on his own *ipse dixit*. In gross terms he may even imply the obligation or wisdom of unquestioning acceptance. In subtler terms he may indicate such an expectation by discouragement of questions, discussion and, most likely, contradiction. But wherein lies the danger? It lies in the very contrast that in recent years we have come to see on a much broader scale—the contrast between totalitarianism and the free society we call democracy. It is the contrast between obedience and choice, between automatic unthinking absorption, as in the case of the sleeping Gamma babies in Aldous Huxley's *Brave New World*, and considered balancing of desiderata followed by a conscious acceptance of that alternative which on balance evidences the greater merit.

The merits of considered acceptance can be well illustrated from another area—that of our national labor relations policy. There

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<sup>28</sup> An exception is the discussion at the Boulder Conference. See Chapter VI, The Problem of Indoctrination, of Stone, *op. cit. supra* note 7, at 185-203.

we have adhered to the fundamental principle that consensually arrived at solutions are preferable to those imposed by the state. We continue to adhere to this today, despite our realization that there are times when the public interest suffers, times when a fiat from on high would declare a wiser solution.

What is at stake here is basic indeed; in part it is a recognition of the dignity of personality and the desirability that persons participate in the disposition of their own future. In part it is pragmatic, in that experience has long shown that agreed-to solutions are more faithfully and longer adhered to than those that rest upon authority and power.

And so it is concerning the acceptance of values and the building of consequent attitudes. Students must be free to reject even those values which their teachers sincerely espouse, and the probabilities that those who reject will be few indeed has nothing at all to do with the matter. The question can't be reduced to terms of minimal risk. Rather, it is a matter that stands surely and firmly on fundamental principle.

I suggest that there may well be general acceptance of the proposition that the professedly rejected lecture method carries vastly more of authority and compulsion than the case-method. Perhaps on a more abstract level it can be correctly asserted that the deductive method of teaching, as contrasted with the inductive, carries a similar weight. One is on less clear ground, yet I take it nevertheless, in asserting that the case method itself, inductive though it is, lends itself more to authoritative implications than do factual problems, even when such problems are accompanied by references to cases deemed relevant aids to the formation of student opinion. More specifically, problems relating to the choices by lawyers among the varieties of conduct open to them can be discussed in the class-room with less recourse to the persuasiveness and sanction of authority—in other words, with less element of compulsion—than can decisions that have already been made, be they by courts or by bar association committees.

But even one who abhors indoctrination must frankly concede that some small measure of it is unavoidable. Perhaps it is here that the character and conduct of the teacher plays its little part, for, in the sense that it is not the product of considered choice, unthinking emulation is an unwitting form of indoctrination. Yet one finds himself in a most insecure and vulnerable position if he objects to such beneficial effects. On the other hand a healthy questioning of what the immediate values are that are relevant to a solution of perplexing personal conduct, what respective weight should be given them in the light of other long run values, whether

both sets of values carry an appeal to the student as worthy of his consideration, can go so far to force a re-examination of means and ends as to expand substantially his capacity for critical judgment, free choice and knowing acceptance.

In sum, the communication of a perception of values and their clarification, acceptance and espousal in actual conduct, can be more effectively accomplished by the study of problems, accompanied by references to relevant source material, than by an array of decisions no matter how carefully and wisely selected. This generalization is supported, I believe, by the greater appeal to student interest, by the vastly greater terrain, especially in the area now known as public responsibility, in which problems may be used, and finally in their susceptibility to class-room discussion, under wise teachers, in comparative freedom from the element of compulsion which is, I assert, anathema to good teaching, personal dignity and lasting acceptance.